

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

TIMOTHY BUFORD,

Plaintiff,

vs.

PAROLE AGENT MOUNTS, et al.,

Defendants.

CASE NO. CV-F-02-6187 OWW LJO P

FINDINGS AND RECOMMENDATIONS
RE DEFENDANTS MOTION
TO DISMISS AND RECOMMENDING
PLAINTIFF'S
IN FORMA PAUPERIS STATUS BE
REVOKED AND PLAINTIFF BE
ORDERED TO PAY FILING FEE
IN FULL WITHIN THIRTY DAYS

[Doc. 69]

Plaintiff Timothy Buford ("plaintiff") is a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff originally filed this action on September 27, 2002 and on November 19, 2002, the court issued an order granting plaintiff leave to proceed in forma pauperis.

On August 24, 2006, pursuant to 28 U.S.C. 1915(g), defendants filed a motion to dismiss. Plaintiff filed an opposition on September 11, 2006 and defendants filed a reply on September 20, 2006. Plaintiff filed a sur-reply on October 3, 2006.

Defendants argue that while in prison, plaintiff has brought at least three actions that have been dismissed as frivolous, as malicious, or for failure to state a claim. Defendants argue plaintiff is therefore ineligible to proceed in forma pauperis in this action, and seek dismissal of this action. 28 U.S.C. § 1915, the statute under which defendants' motion was brought, governs proceedings in forma

1 pauperis. Section 1915(g) provides that “[i]n no event shall a prisoner bring a civil action . . . under this
2 section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility,
3 brought an action or appeal in a court of the United States that was dismissed on the grounds that it is
4 frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is
5 under imminent danger of serious physical injury.”

6 Defendants set forth three dismissals they contend count as “strikes” under section 1915(g) as
7 the cases were dismissed for failure to state a claim: *Buford v. Gray*, USDC, E.D. 1:00 cv-6206 OWW
8 SMS (dismissed January 3, 2001); *Buford v. Fresno County Jail*, U.S.D.C. E.D.1:00 cv-5542 OWW
9 HGB (dismissed March 21, 2001); and *Buford v. Lewis, et.al.*, U.S.D.C. N.D. 3:00 cv-2631 CAL
10 (dismissed October 19, 2000).

11 In his opposition, plaintiff concedes that two of the three cases identified by defendants are
12 strikes. However, plaintiff contends that *Buford v. Fresno County Jail*, U.S.D.C. E.D.1:00 cv-5542
13 OWW HGB, was not a strike because he was not incarcerated when he filed that claim on April 6, 2000.
14 Plaintiff’s contentions are without merit. *Buford v. Fresno County Jail* was filed in this court. Review
15 of the record in that case reveals that plaintiff was incarcerated at the time he filed the action. In
16 addition, plaintiff’s prison records, which are attached to defendants motion to dismiss, reveal that he
17 was arrested and detained at the Fresno County Jail on April 4, 2000, his parole revoked on April 14,
18 2000 and he was received at the Wasco State Prison Reception Center on May 11, 2000. *See*
19 *Memorandum in Support of Motion to Dismiss*, Exhibits F and G.

20 Accordingly, plaintiff has been subject to section 1915(g) since October 19, 2000, and is
21 precluded from proceeding in forma pauperis in any action filed after that date unless plaintiff is, at the
22 time the complaint is filed, under imminent danger of serious physical injury. The court has reviewed
23 plaintiff’s complaint and finds that plaintiff has not alleged any facts that support a finding that he is,
24 at this time, under imminent danger of serious physical injury. Thus, plaintiff may not proceed in forma
25 pauperis, and must submit the appropriate filing fee in order to proceed with this action. Because the
26 court previously granted plaintiff leave to proceed in forma pauperis in this action, the court recommends
27 that plaintiff’s in forma pauperis status be revoked and plaintiff be ordered to submit the filing fee in full
28 within thirty days.

Based on the foregoing, the court HEREBY RECOMMENDS that:

1. Defendants' motion to dismiss, filed August 24, 2006 be granted;
2. Pursuant to 28 U.S.C. § 1915(g), plaintiff's in forma pauperis status in this action be revoked;
3. Plaintiff be ordered to submit the \$150.00 filing fee in full within thirty (30) days; and
4. If plaintiff fails to pay the \$150.00 filing fee in full within thirty (30) days, this action be dismissed, without prejudice.

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within twenty (20) days after being served with these Findings and Recommendations, plaintiff may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: February 21, 2007
3b142a

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE